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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 92

JAMES H. HARRIS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONER

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Opinion Below

The opinion of the United States Court of Appeals for the District of Columbia Circuit sitting *en banc* reversing the division of the Court which held that the District Court erred in admitting into evidence a registration card seized from Petitioner's automobile is reported in —— U.S. App. D.C. —— (1967) (R. 132-138; 153-157).

Jurisdiction

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on December 6, 1966. The petition for a writ of certiorari was filed on December 28, 1966 and granted on April 17, 1967. The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

Question Presented

May property which was seized from petitioner's automobile during a general administrative search at a time subsequent to petitioner's arrest, after his automobile had been impounded by the police, and towed to a police precinct lot some four or five miles from the place of arrest, and while the petitioner was in custody and under arrest at the police station be received in evidence against the petitioner consistent with the Fourth Amendment, where the search of the automobile and seizure of the property was performed without a warrant?

Constitutional Provision Involved

United States Constitution

Fourth Amendment:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly de-

scribing the place to be searched, and the persons or things to be seized."

Section 12, D.C. Metropolitan Police Department General Order No. 10, reads as follows:

> "When a vehicle is brought to a station, whether impounded, stolen, abandoned, or taken from a prisoner, it shall be the responsibility of the officer who takes the vehicle in charge to thoroughly search such vehicle, including the glove compartment and trunk, and remove all property therefrom. He shall be responsible for seeing that all such property is recorded and properly safeguarded."

Statement

During the late evening of August 29, 1964, at approximately 11:45 p.m. a yoke robbery occurred in the 5500 block of 13th Street, N.W., Washington, D.C. Among other articles taken from the victim was a registration card for his automobile, bearing his name, address and automobile tag number. Officer Morda observed three colored males running in the 5600 block of 13th Street, N.W. and get into a 1953 two-tone Ford bearing a District license tag 2X751. Officer Morda, after observing the victim of the robbery, phoned the description of the automobile and tag number to the precinct.

The next morning, August 30, Officer Baker of the Sixth Precinct received the report of the robbery along with Officer Morda's description of the automobile and was assigned to locate the car and its owner (R. 20-21). Officer Baker proceeded to the 2500 block of M Street, N.W. the area of petitioner's residence. At about 1:30 p.m. the car

was located in that block and petitioner was observed getting into the car. Officer Baker approached petitioner and arrested him, stopping him from entering the car and searched him (R. 4-5). Only a cursory inspection of the car was made at the time (R. 5; R. 59-60). The time of arrest (without a warrant) was estimated to be 1:30 p.m.

Officer Baker called for a police crane to tow the petitioner's vehicle to the sixth precinct. Petitioner was transported to the same precinct in a police cruiser; a ride of ten to twenty minutes. The car was left on the street unattended and unlocked to be picked up by the police crane (R. 6; R. 29; R. 49).

At approximately 3:00 p.m., an hour and a half after the petitioner's arrest, the crane operator came into the precinct and advised Officer Baker that the car had been placed on the parking lot. Officer Baker was further advised by the crane operator that a light rain was falling; however, he did not roll up the windows since he did not want to disturb fingerprints (R. 22; 76).

Officer Baker then, with petitioner's keys, went out to the car for the purpose of tagging, rolling up the windows, and making a search through it (R. 76-77). He described this search as a "search" or as "an inventory search" (R. 39-41; 79-80; 83-84). No warrant had been issued for this search.

Officer Baker first put a property tag on the steering wheel of the car. He then searched the rear seat and the rear floor of the car (R. 77; 79-80). He searched in the glove compartment and found "routine things you keep in a glove compartment" (R. 77-78), which he made no effort

to remove from the car and take into the precinct station (R. 77-78). He also looked behind the sun visors (R. 78).

Despite the fact that he possibly could have rolled up the right front car-window while he was in the front seat searching the glove compartment and the backs of the sun visors (R. 86-87), Officer Baker proceeded out of the car and opened both doors on the right side, later testifying that his purpose was to roll up the windows (R. 78-79). When he opened the right front door, the automobile registration card which had been taken from the robbery victim was found lying on the door jamb, in the "well of the weatherstripping" (R. 70).

Officer Baker testified that the purpose of his "search" (R. 80) was to find property to protect (R. 41; 77). But the officers solicitude for the protection of the car appears to have terminated at this point, because he was "pretty excited" (R. 71) and he rushed into the precinct station, not recalling whether he shut the car door or left it open (R. 69). He brought petitioner out and confronted him with the registration card. Thereafter, Officer Baker took the card into the precinct station and put it into custody of the chief property clerk (R. 69; 79). Only thereafter was a search warrant obtained; it was directed to the property clerk and specified the registration card (R. 24-25; 63).

After a motion to suppress the use of the card in evidence was made and denied by the District Court, the card was received in evidence against petitioner at his trial for robbery. Petitioner was convicted and sentenced to a term of two to seven years.

On appeal to the United States Court of Appeals for the District of Columbia Circuit, petitioner's conviction

was reversed on the grounds that the search of the car and the seizure of the registration card violated the Fourth Amendment and that the admission of the card into evidence was accordingly error, the Court principally relying upon *United States* v. *Ventresca*, 380 U.S. 102 (1965), and *Preston* v. *United States*, 376 U.S. 364 (1964). The court rejected a contention by Government that since the car lawfully came into police custody as an "instrumentality" of crime seized incident to an arrest, it could subsequently be treated the same as any other piece of evidence, and accordingly searched at leisure. The court rejected this argument primarily on the basis of *Trupiano* v. *United States*, 334 U.S. 699 (1948), and *Kremen* v. *United States*, 353 U.S. 346 (1957) (R. 136-38).

The Government subsequently filed a petition for rehearing en banc (R. 140-51), primarily on the grounds that the full court should consider the so-called "instrumentality" theory advanced by the Government but rejected by the division which had heard the case (R. 140-41). As an asserted additional reason in favor of the validity of the search, the Government, pointing out that "Detective Baker was proceeding pursuant to a police regulation [Metropolitan Police Department General Order No. 10, Series No. 8] . . . when he found the evidence in question", argued that this administrative search was justified under the doctrine of *Frank* v. *Maryland*, 359 U.S. 360 (1959) (R. 147, 149).

The petition for rehearing en banc was granted (R. 152), and on rehearing the Court of Appeals, en banc, with two dissents, affirmed the judgment of the District Court, on the grounds that there was "no search at all in relation to

this particular evidence" (R. 156). The court expressed the view that this conclusion permitted it to avoid the broader question presented since there therefore was "no Fourth Amendment issue inescapably requiring resolution" (R. 156).

SUMMARY OF ARGUMENT

I.

The Fourth Amendment requires a warrant as a condition upon the making of searches or seizures, except in certain "jealously and carefully drawn" exceptional circumstances. In the case of *Preston* v. *United States*, 376 U.S. 364 (1964), this Court made it plain that this principle applied to searches of automobiles. The only exceptions which this Court mentioned, in *Preston*, from the rule of necessity to obtain a warrant, were that of a search "incidental" to a valid arrest, and that of a search pursuant to the "necessity" doctrine, which has its classic application in the case of moving cars, but which, as the Court indicated, has no application at all in the case of impounded cars.

The search of petitioner's automobile in this case falls within neither exception as announced in *Preston*, nor within the most recent exception permitting a search of an automobile without having first obtained a warrant. *Cooper* v. *California*, 386 U.S. 58 (1967).

II.

The search also violated the Fourth Amendment because it was made incident to a general practice of making general searches of all automobiles in police custody. The

Government has admitted that in the search of petitioner's car Detective Baker was proceeding pursuant to Section 12 of General Order No. 10 of the Metropolitan Police Department regulations. That regulation provides for a general, unparticularized search of all cars in police custody. On its face it is completely inconsistent with the theory taught by the *Preston* and *Cooper* cases; it indicates that none of the narrow justifications permitted by those cases for a warrantless search of an automobile was the basis of the police action here.

The fact that the police regulation was the basis of this search, indeed, is a further reason for the invalidity of the search under the Fourth Amendment. The regulation provides for a general, unparticularized search, in flat violation of the Fourth Amendment's command of particularity. See *Kremen* v. *United States,* 353 U.S. 346 (1957); *Berger* v. *New York,* 87 Sup. Ct., 1873 (1967). Since *Camara* v. *Municipal Court,* 87 Sup. Ct., 1772 (1967), the regulation cannot be justified as providing for a general "administrative" search. Indeed, in any event, it is a regulation providing for a search under circumstances where a search is apt to turn up evidence of crime. The fact that the search was undertaken under the police regulation not only negates, then, the possibility of justifying it under any of the recognized exceptions to the general rule that a search warrant is required, but also furnishes an independent basis upon which to conclude that the search violated the Fourth Amendment.

III.

A. The Government in its argument before the Court of Appeals urged that Court to accept the warrantless

search of petitioner's automobile on the theory that since the vehicle was seized as an instrumentality of the crime committed there was no need to comply with the requirements of the Fourth Amendment, that is no need to first obtain a warrant prior to the search of the vehicle.

The instrumentality argument is that since the car was lawfully seized at the time of petitioner's arrest, by reason of a search "incidental" to his arrest; that this "seizure" as a matter of law, embraces not only the car but the contents of the car, regardless of what they are, and regardless of whether the officers making the seizure are conscious of the items in question or not; and that from this it follows that, having lawfully seized all the contents of the car, these contents may be gone through by the police at leisure thereafter.

1. The "instrumentality/contents" seizure theory would restrict the applicability of *Preston* to a very narrow category of cases; practically, to those cases which, although the car was in custody and accordingly no longer a subject of the "necessity" doctrine, that custody was unlawful. Otherwise, the legality of the police seizure of the car would, under the Government's theory, give *carte blanche* to subsequent searches of it. The *Preston* and *Cooper* decisions in this Court teach that the legality of the seizure of the car is irrelevant. The Court's focus has been entirely on the situation prevailing when the search was actually made, and on whether any of the exceptions it noted to the rule requiring a warrant was presented at that time.

2. Moreover, the "instrumentality/contents" theory violates the fundamental constitutional requirement of par-

ticularity in a search or seizure. It implies that the Government can make a general, blanket seizure of everything in a car by seizing the car—including contents of which the Government has no knowledge whatsoever. As such, it violated one of the dominant principles that runs through the construction of the Fourth Amendment. Moreover, it leads to the absurd consequence of applying principles to a search without a warrant that are looser than those applied to a search with a warrant. For under a search warrant calling for the automobile, it would not have been lawful to have returned the registration card.

3. The Government's theoretical basis for the "instrumentality/contents" theory is based upon a false analogy between the chemical or physical analyses of small objects validly seized by the Government, and the further search of mobile places which, like cars, are generally repositories of the "papers and effects" of the people. This Court in the *Preston* case, however, recognized that cars are entitled to the protection of the Fourth Amendment, and that, in effect, a "search" of a car is just that, a "search" in the constitutional sense. This is also the common sense of the matter.

B. The Fragmentation approach used by the Court of Appeals *en banc* in an effort to avoid the broader questions presented led it to deny that at the very instant the registration card was found, the officer was engaged in a "search", and thus to conclude that the car was validly seized. But, the facts of the case are clear that the officer was engaged in a continuing process, one of the purposes of which was to make a search of the car, and indeed the District Court so found. When the incriminating evidence

was found, protection of the car was quickly subordinated to incrimination of the prisoner. The approach suggested by the Court of Appeals would cause the judiciary to embark upon a rule which would be incredibly difficult of practical administration, resulting in constant psychological examination of police officers in a futile quest of their motives as of a given instant. Moreover, whatever the officer's stated purpose the precise action he took at the time of finding the card was calculated to advance a search of the vehicle, as indeed it did.

ARGUMENT

I.

The Search Under Which the Metropolitan Police Found the Registration Card in Petitioner's Car, Undertaken Without a Search Warrant, Violates the Fourth Amendment in That It Does Not Fall Within Any of the Exceptions Recognized by the Federal Cases From the Principle That a Search Warrant Is Generally Required for the Validity of a Search.

A. The Requirement of a Search Warrant to Search an Automobile; General Background

The basic text for the determination of the question in the case at bar is the Fourth Amendment which provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

It is popularly said that the Amendment forbids "unreasonable searches and seizures," but the fact of the matter is that it does not prohibit them in the abstract, or "at large"; thus, it is not an adequate constitutional justification for a search that under the circumstances making a search was a "reasonable" thing to do.

The Fourth Amendment, like much of the rest of the Bill of Rights, speaks in terms of a prescribed *procedure*. It lays down a mandatory procedure which must be followed in order to justify a search or seizure. That procedure is the antecedent review of the "reasonableness" of a proposed search or seizure by an independent magistrate, upon an application for a warrant by the officers desiring to make a search or seizure.

This Court recently summed the matter up in *Camara* v. *Municipal Court,* 87 Sup. Ct. 1772, 1730-31 (1967), as follows:

> One governing principle, justified by history and by current experience, has consistently been followed: Except in certain carefully defined classes of cases, a search of private property without proper consent is "unreasonable" unless it has been authorized by a valid search warrant.

As the Court put it in *Berger* v. *New York,* 87 Sup. Ct. 1873, 1881 (1967), it is a requirement of the Fourth Amendment that "a neutral and detached authority be interposed between the police and the public."

Thus, there are doubtless innumerable situations where making a search or seizure might be, colloquially speaking, a "reasonable" thing to do; but that is not to say that the

Constitution permits making such a search or seizure without a search warrant. See *Camara* v. *Municipal Court, supra,* 87 Sup. Ct., at 1733; *Jones* v. *United States,* 357 U.S. 493, 497-99 (1958); *Agnello* v. *United States,* 269 U.S. 20, 33 (1925). This Court put this in striking terms in *Johnson* v. *United States,* 333 U.S. 10, 13-14 (1948), which it reiterated in *United States* v. *Ventresca,* 380 U.S. 102, 106 (1965):

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. . . ."

To be sure, as the Court put it in *Elkins* v. *United States,* 364 U.S. 206, 222 (1960), the course of the interpretation of the Fourth Amendment has not been "unrealistic or visionary," and even the requirement of the obtaining of a search warrant has not been construed as an absolute. The Supreme Court has recognized certain limited exceptions to the general rule of the Amendment that a search warrant may be obtained; under these exceptions, where applicable, a search may be lawful although conducted without a war-

rant if it is in fact "reasonable." But the cases are explicit in teaching that these "exceptions" are what the word implies, and are indeed restricted to "exceptional circumstances." See *Johnson* v. *United States,* 333 U.S. 10, 14 (1948); *McDonald* v. *United States,* 335 U.S. 451, 454 (1948). The exceptions from the mandate that a warrant be obtained are "jealously and carefully drawn." *Jones* v. *United States,* 357 U.S. 493, 499 (1958).

It appears that for many years there was a misconception that the Fourth Amendment's requirement of a search warrant did not extend to searches of automobiles, and that automobiles were in some loose way to be considered a case altogether apart for the application of the Fourth Amendment.[1] In a decision of three years ago, this Court put these notions to rest. *Preston* v. *United States,* 376 U.S. 364 (1964). In *Preston,* the police, in an arrest assumed to be lawful, arrested three men for vagrancy who had been seated in a motor car for five hours at night in a business district. Upon their arrest, the police took the men to headquarters. "The car, which had not been searched at the time of the arrest, was driven by an officer to the station, from which it was towed to a garage" (376 U.S., at 365). With the car thus in police custody, a search of it was made, and various items were found in it which were given in evidence in a trial of the men for conspiracy to commit bank robbery.

This Court unanimously reversed the judgment of conviction and held that the search of the car and the seizure of the items given in evidence were unlawful because they were

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[1] Perhaps certain language in *Husty* v. *United States,* 282 U.S. 694, 700 (1931) led to this misconception.

undertaken without a warrant and without justification under any of the exceptions which permit searches or seizures without a warrant.

The Court reviewed two recognized exceptions to the general principle that a search warrant must be obtained prior to the making of a search or seizure. These two categories of exceptions were (1) situations where a search is permissible as a contemporaneous search incident to a lawful arrest (*Weeks* v. *United States,* 232 U.S. 383, 392 (1914); *Agnello* v. *United States,* 269 U.S. 20, 30 (1925); *Marron* v. *United States,* 275 U.S. 192, 199 (1927); *Harris* v. *United States,* 331 U.S. 145 (1947); *United States* v. *Rabinowitz,* 339 U.S. 56, 61-62 (1950); *Abel* v. *United States,* 362 U.S. 217, 235-36 (1960)); and (2) situations involving the "necessity" doctrine, where there is immediate danger that the matters to be obtained through the search or seizure will be removed from the jurisdiction or otherwise destroyed (see *Carroll* v. *United States,* 267 U.S. 132 (1925); *Brinegar* v. *United States,* 338 U.S. 160 (1949)). While the Court—obviously in the context of the second exception—observed that "[c]ommon sense dictates, of course, that questions involving searches of motor cars or other things readily moved cannot be treated as identical to questions arising out of searches of fixed structures like houses" (376 U.S., at 366), it made it clear that the application of the "necessity" doctrine in the case of automobiles applied only as long as the car remained in a condition of being able to be "readily moved." See 376 U.S., at 368.

In *Cooper* v. *California,* 386 U.S. 58 (1967), a case involving review of a state court judgment, a majority of

this Court recognized a further exception to the general rule requiring a search warrant as a prerequisite to the search of a car in police custody where that custody was pursuant to a statute providing for it and envisioning an ultimate forfeiture of the vehicle to the state if the car had been used in the unlawful enterprise for which its owner had been arrested and charged, and if the search was for matters connected with the charged crime and the basis of forfeiture. See 386 U.S., at 61.

B. The Search Falls Within None of the Recognized Exceptions

It is clear that this search cannot be justified as "incident" to petitioner's arrest or on the grounds of the so-called "necessity" doctrine.

The Government makes no serious suggestions here that it is possible to justify the search of petitioner's car some hours after his arrest, at a place miles from the point of arrest, as "incident" to that arrest. Nor does the Government seek to justify the search on the grounds of the "necessity" doctrine—as again obviously it cannot since the car was in police custody at the time of the search.

Moreover, the further exception recognized by *Cooper*, even if applicable in this Federal prosecution (see dissenting opinion, 386 U.S., at 65)[2] does not justify the search of petitioner's car without a warrant. Here there is no

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[2] The Court observed in *Berger* v. *New York*, 87 Sup. Ct. 1873, 1881 (1967), that in applying the principles laid down in Federal cases adjudicated under the Fourth Amendment to state cases (like *Cooper*) under the Fourteenth, it must be remembered that the principles "are not susceptible of Procrustean application . . . " quoting from *Ker* v. *California*, 374 U.S. 23, 33 (1963).

narrowly designed, specific statute, looking toward the ultimate forfeiture of petitioner's car and its custody pending a determination of forfeiture. No statute whatsoever envisioned the forfeiture of petitioner's automobile; needless to say, there is no District of Columbia ordinance or statute purporting to forfeit the automobile of a person charged or convicted of yoke robbery. There was neither instituted nor was it possible to institute any proceeding whereby petitioner's title to the car would be cut off. Indeed, it would appear that upon petitioner's admission to bond he could have recovered the custody of the automobile from the police.[3]

Moreover, the search of petitioner's automobile was *not* "closely related to the reason petitioner was arrested, the reason his car had been impounded, and the reason it was being retained"—as was the case in *Cooper*, 386 U.S., at 61. Here it has been admitted by the Government (R. 147) that the search of petitioner's vehicle was pursuant to a D.C. Police Regulation which reads as follows:

> "When a vehicle is brought to a station, whether impounded, stolen, abandoned, or taken from a prisoner, it shall be the responsibility of the officer who takes the vehicle in charge to thoroughly search such vehicle, including the glove compartment and trunk, and remove all property therefrom. He shall be held responsible for seeing that all such property is recorded and properly safeguarded." Metropolitan Police Department General Order No. 10, Series 1958, Section 12

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[3] Cf. the discussion of the *Preston* decision in *Cooper*, 386 U.S., at 61.

The police then were not acting, in searching petitioner's car, in making a search closely related to the reason why petitioner was arrested. They were, rather, engaged in making a general search of a nature which would be made in all cases. We shall, indeed, develop in Part II that the fact that the search was made pursuant to a general regulation providing for general searches of automobiles in custody in all cases is a further reason why it violated the Fourth Amendment. Thus, this case contains none of the significant factors found in the *Cooper* case which led the Court there to conclude that a search of an automobile without a warrant was not in violation of the Fourth Amendment; it, on the other hand, contains all the significant factors which led the Court in *Preston* to conclude that a warrantless search was unlawful.

II.

The Search Is Also Violative of the Fourth Amendment Because It Was Part of a General Practice of Making General Searches of All Automobiles in Police Custody.

The demonstration which we have made in Part I is, we submit, sufficient to show that the search of petitioner's automobile which resulted in the discovery of the registration card violated the Fourth Amendment. There is another route which necessarily leads to the same conclusion.

As the Government has admitted (R. 147), in the search of petitioner's car "Detective Baker was proceeding pursuant to a police regulation"—Section 12 of General Order No. 10, Series 1958, which we have quoted above, p. 17. That regulation provides for a general, unparticularized search of all cars in police custody. The search is to be

made without a warrant; and it is not limited to those situations where the law is such that a search of an automobile without a warrant may be made. The regulation on its face is completely inconsistent with the theory which the *Preston* and *Cooper* cases teach, that an automobile is one of the "effects" of the people which are protected by the Fourth Amendment. The fact, of course, that in this case the general search turned up something which related to the crime for which petitioner was being held does not justify the search. It is well established that a search is not justified by what it may turn up. See *Henry* v. *United States,* 361 U.S. 98, 104 (1959).

Not only is the Police Regulation a general one, in that it applies to all automobiles coming within police custody, but the search which is to be made in all these cases is a most general one in itself. The regulation commands the police officers to *"thoroughly search* such vehicle, including the glove compartment and trunk, and remove *all property* therefrom." (Emphasis supplied.) The search which it prescribes is commonly called, and quite properly so, an "inventory" search.*

The inventory search regulation offends against the fundamental requirement of particularity in connection with the object of a search or in connection with the making of a seizure. If there is any main, dominant principle—apart from the principle of the necessity for a warrant—that runs through the cases interpreting the Fourth Amendment, it is the need for *particularity* as a necessary ingredient of a lawful search or seizure. A general search or seizure

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*The Court of Appeals adopted this terminology. See R. 154 n. 1.

is flatly at variance with the theory of the Amendment. The express language of the Amendment is the starting place. Even where a search or seizure is undertaken upon a warrant, that warrant must be one "*particularly* describing the place to be searched, and the person or things to be seized." This language has its roots in the experience in the Revolutionary period—in the Colonists' abhorrence of the general "writs of assistance" which permitted untrammeled, unparticularized searches and seizures. "[T]he IVth Amendment was written against the background of the general warrants in England and the writs of assistance in the American colonies . . . " Vinson, *J.*, in *Neuslein* v. *District of Columbia,* 73 U.S. App. D.C. 85, 87-88, 115 F.2d 690, 692-693 (1940); *Berger* v. *New York,* 87 Sup. Ct. 1873, 1883 (1965); *Henry* v. *United States,* 361 U.S. 98, 100-01 (1959); Douglas, *J.*, dissenting, in *Frank* v. *Maryland,* 359 U.S. 360, 376-82 (1959); Brandeis, *J.*, dissenting in *Olmstead* v. *United States,* 277 U.S. 438, 474, 476 (1928).

And so it is that even where a search is permissible, there are strict limits imposed upon the matters or things which may be seized under that search. "[N]or may the government seize, wholesale, the contents of a house it might have searched." *Abel* v. *United States,* 362 U.S. 217, 235 (1960). This Court has held that, even where a search for items capable of lawful seizure is permitted, a general seizure cannot be undertaken for the purpose of amassing items to be looked through later at leisure in search of particular things which are capable of lawful seizure. *Kremen* v. *United States,* 353 U.S. 346 (1957). In *Kremen* it was held that, incident to an arrest, the contents of the cabin in which the defendants were arrested could not be

bundled off to an FBI office for further examination. Even though the items actually given in evidence would have been themselves subject to a lawful seizure at the time of the arrest (see dissenting opinion, 353 U.S., at 348), the illegality of the dragnet, "inventory" seizure was held to be enough to make those items inadmissible in evidence.

The most recent decision of this Court enforcing the Fourth Amendment's command of "particularity" is *Berger* v. *New York*, 87 Sup. Ct. 1873 (1967), which is, we submit, a controlling authority here. There, a New York state court's order for electronic monitoring of telephone calls was struck down because it violated the requirement of particularity. 87 Sup. Ct., at 1882-84. Like New York's statute there, the District of Columbia Police Regulation here purported to authorize searches without particularization. Neither lays down any requirement "for particularity . . . as to what crime has been or is being committed, nor 'the place to be searched,' or 'the persons or things to be seized' as specifically required by the Fourth Amendment." 87 Sup. Ct., at 1882. Like the New York statute condemned in *Berger*, the Police Regulation here is a "broadside authorization," not "'carefully circumscribed' so as to prevent unauthorized invasions of privacy . . ." 87 Sup. Ct. at 1883. There, the Court condemned a statute permitting electronic eavesdropping "without requiring belief that any particular offense has been or is being committed; nor that the property sought . . . be particularly described." 87 Sup. Ct. at 1883. The searches contemplated by the Police Regulation here are similarly unparticularized; the regulation applies to all automobiles in police custody and purports to authorize a sweeping search, without particularization, of all of them. Just as the statute there gave "the officer

a roving commission to seize any and all conversations" (*ibid.*), the regulation here gives him a roving commission to seize any and all property he finds in any car in police custody. We submit that the search here, based on the Police Regulation, cannot be squared with the Fourth Amendment's command of particularity.

A primary basis of the Government's argument in the Court below was that the Police Regulation, which authorized this general practice of making a general search of all automobiles in police custody, merely contemplated the sort of "administrative search" which the theory of *Frank* v. *Maryland*, 359 U.S. 360 (1959), made lawful without a warrant. (See R. 149) But, of course, *Frank* v. *Maryland* is no longer the law, and even an administrative search not specifically pointed to the discovery of evidence of the commission of crime is subject to the requirements of the Fourth Amendment that a search warrant be obtained. In *Camara* v. *Municipal Court*, 87 Sup. Ct. 1772 (1967), *Frank* was overruled. The Court there and in *Camara's* companion case, *See* v. *City of Seattle*, 87 Sup. Ct. 1773 (1967), held the requirement of the obtaining of a search warrant broadly applicable to what the Court termed "administrative searches."

Indeed, this case is an *a fortiori* one from *Camara* and *See*. The Police Regulation envisions a general search in all cases, including cases of a vehicle "taken from a prisoner," as was the case here. Obviously, in this context—which is a substantial part of the overall area in which the regulation will be applied—the regulation clearly contemplates the obtaining of evidence through searches for use in prosecuting crimes. The fact that a man is a prisoner means, one hopes, that there is probable cause

that he has committed a crime. An automobile taken at the time of his arrest is an obvious place in which to look for evidence of the crime. This, of course, is precisely what the search in question here turned up.

We submit that the conclusion follows that such a search may not be undertaken, where the car is "taken from a prisoner," regardless of what the dominant motive of the police might be in making a particular search or in promulgating the regulation in question. Indeed, even the incredible suggestion in the record (R. 41) that the "sole" purpose of the regulation is to safeguard property can lead to no other conclusion. Even if such a suggestion as to the sole purpose of the procedure is made in good faith, it is hopelessly naive in terms of the procedure's effect. The objective facts of the matter are that the regulation operates directly upon a person accused of crime; and it operates to authorize a warrantless search in a context where evidence of crime is apt to be found. The Government's suggestion that the sole purpose of the search is to protect property and not to turn up evidence should be treated with no greater respect than any attempt to disclaim the natural and probable consequences of a person's acts. When a car "taken from a prisoner" in connection with his arrest is searched, a natural and probable consequence is that evidence may be turned up. Whatever may be argued to be the Regulation's *purpose*, its natural *effect* is plain.

We submit that once this is recognized, any attempt to justify the warrantless search as a measure to protect the prisoner's property is mere cant. In the first place, on its face the Regulation is inconsistent with this rationalization, because it provides for a search through the closed

areas of the car—the glove compartment and trunk—and the record here makes it plain that these areas are searched even though they are locked, even if it means entering the trunk by cutting through from the rear seat (R. 77). It would take a quixotic thief to try to go to similar lengths to commit pilferage from a car sitting in the police station lot.

Moreover, even if the purpose of the search is partly benign, and the search has as one of its elements—or even its dominant element—the protection of the prisoner's property, the fact remains that it is a search to which the prisoner has not consented, but which is apt to turn up evidence against him (R. 40-41). If the prisoner desires to have his property protected, presumably he can so advise the arresting officers. There is no indication on this record that the petitioner consented to the attempts by the police, if that is what they were, to protect his property. To say that the police are privileged to engage in an action which has the effect of protecting the prisoner's property, whether he likes it or not, by taking an action which is also calculated to develop evidence against him is to articulate the sort of "Big Brother" concept of the state against which the Constitution has set its face. The claim of solicitude for the petitioner's property sounds strange when it is made to justify a search whereby he is to be deprived of his liberty. In any event, the argument based on it cannot survive the recent decisions in *Camara* and *See*.

* * * * *

To sum up: The search which resulted in the finding of the registration card in petitioner's automobile was undertaken, concededly, under authority of a general regulation purporting to authorize a general search of every auto-

mobile in police custody on every basis whatsoever. This particular search was clearly not justified as incident to petitioner's arrest. Nor does the "necessity" doctrine authorize this search. Moreover, none of the particularized factors, stemming from the state procedure in question, which led the Court to conclude in *Cooper* v. *California*, *supra*, that the search there involved could have been undertaken without a warrant is present here. Indeed, rather than being made pursuant to a specific statute confirming custody of the automobile in the state with a view to its ultimate forfeiture, this search was undertaken on the basis of a general regulation which purports to authorize searches in all cases. Not only does this negate the possibility of justifying the search under any of the recognized exceptions to the general rule that a search warrant is required, but it furnishes an independent basis upon which to conclude that the search violated the Fourth Amendment.

III.

Certain Justifications Which May Be Advanced for This Warrantless Search Are Without Basis.

A. The "Instrumentality/Contents" Seizure Theory

Before the Court of Appeals the Government urged, and may be expected to urge before this Court, the following theory, which we will call the "Instrumentality/Contents" seizure theory, in favor of the validity of this search without a warrant. The theory runs as follows: The car was lawfully seized at the time of petitioner's arrest, by reason of a search "incidental" to his arrest; that this "seizure," as a matter of law, embraces not only the car but the contents of the car, regardless of what they are, and regard-

less of whether the officers making the seizure are conscious of the items in question or not; and that from this it follows that, having lawfully seized all the contents of the car, these contents may be gone through by the police at leisure thereafter.

1. *The "Instrumentality/Contents" Seizure Theory in Practice Is Contrary to This Court's Holding in Preston.*— The first point that must be noted about the Government's theory is that it restricts the *Preston* doctrine to a very narrow category of cases. In effect, it restricts the application of the *Preston* case—which itself is limited, generally speaking, to cases where the automobile is in police custody[5]—further by limiting it to situations where the police custody of the automobile is itself illegal.

In the *Preston* case this Court did not address itself to the question whether the police custody of the car was itself lawful or not. If it is true that the seizure of an automobile as a matter of law involves the seizure of all its contents, presumably this Court would have said so in *Preston*. If the seizure of the petitioners' auto in *Preston* were unlawful, one would have thought that that was the end of the matter and that the remainder of the Court's analysis could have been dispensed with. It is indeed a strange thing that the legality of the seizure of the car, which the Government now identifies as the single dispositive factor, was completely ignored in the Court's decision.

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[5] This is because the *Preston* case will have little applicability outside the situation where the auto is in police custody because, unless the car is in police custody, the "necessity" exception from the *Preston* doctrine will most likely apply; the car will be capable of being moved away.

The real point, of course, is that the legality or illegality of the seizure of the car is not dispositive, under *Preston*, and *Cooper*, of the legality of its subsequent search. A car is "searched" when the officers go through it. A search and seizure of a car's contents does not take place when the car itself is seized. This is the common sense of the matter, "and common sense often makes good law." (*Peak* v. *United States*, 353 U.S. 43, 46 (1957).) "[L]awful custody of an automobile does not of itself dispense with constitutional requirements of searches thereafter made of it . . ." *Cooper*, 386 U.S., at 61. Indeed, it is well established that the fact that the Government may have lawful possession of an object does not mean that it has a power to search its contents. The classic example is that of a first-class letter which while in the course of the mails is in the lawful possession of the Post Office Department. But a search warrant is required to make a search of the letter's contents. See *Ex parte Jackson*, 96 U.S. 727 (1877); *Oliver* v. *United States*, 329 F. 2d 818 (8th Cir. 1957), *cert. dismissed*, 353 U.S. 952 (1957).

As we have suggested, adopting the Government's contention would restrict the *Preston* holding, as a practical matter, to a trifling number of exceptional cases; at the most, those that would be left would be those in which the suspect made no use of his car as a means of transportation either immediately before, or after, the time of the commission of the crime. Any use of the car after the crime to transport the person of the suspect away from the site of the crime would make the car, under the Government's theory, an instrumentality of the crime; and seizable as such without a warrant incident to the defendant's arrest if the defendant happens to be arrested close to his

car.[6] In all these circumstances, the Government would claim the right to seize the car without a warrant as an "instrumentality" of the crime, and, most importantly, would urge that that seizure as a matter of law in every case also amounted to a seizure of the contents of the car, permitting those contents to be gone through later by the police at leisure without a warrant.

2. *The Theory Negates the Requirement of Particularity.*—The Government's argument amounts to an assertion that, incident to an arrest, the Government may, by impounding the arrested person's car, be deemed to have seized the entire contents of that car—including contents of which the officers making the seizure are in no way aware, and contents themselves not lawfully subject to seizure.

This is vividly demonstrated here. The police were not aware of the fact that the stolen registration card was in the car at the time they impounded it. Yet, under the Government's theory, they had at this time made a lawful seizure of the car, including the registration card, although they were not aware of the card's existence in the car. Similarly, the Government's theory leads to the conclusion that the officers at the time of the impounding of the car lawfully seized the contents of the glove compartment, although the fact of the matter is that they did not know what was in the glove compartment, and that, as it turned out, the only things in the glove compartment were the usual sort of innocent articles that people keep in their glove compartments, obviously not subject to seizure.

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[6] It might be seizable without a warrant on some other theory, such as the "necessity" doctrine, as well.

It hardly requires elaboration that such a general, unparticularized search violates the requirement of particularity which we have discussed above, pp. 18-22 and which is evidenced by *Kremen* v. *United States,* 353 U.S. 346 (1957), and *Berger* v. *New York,* 87 Sup. Ct. 1873 (1967), discussed above.

Here, under the Government's "instrumentality/contents" theory, there was a general seizure of all the contents of the car—including contents not subject to seizure at all—thus amassing items to be looked through later at leisure in search of particular things which are capable of lawful seizure. The only difference from the *Kremen* case is that there the officers had to put the contents of the house into other containers for the purpose of accumulating them for a later inspection, whereas in this case the appellant's car, under the Government's theory, provides a convenient "package" for this purpose. But the result, we submit, in constitutional terms is the same, and equally offensive to the constitutional requirement of particularity. And for reasons similar to those which we develop in Part II, above, the application of the "instrumentality/contents" seizure theory violates the reaffirmation of the Constitutional imperative of particularity set forth in *Berger* v. *New York, supra.*

3. *The Theory Is Based on False Analogy.*—It appears that the Government's argument is based on false analogy to the analysis of items which are lawfully seized by the police, such as the ballistic examination of bullets or the chemical examination of powders and the like which have been lawfully seized. (Gov't Br., Court of Appeals, pp. 8-9) The analogy is obviously unavailing. Common sense and every day experience, as well as the clear teachings of the

Preston and *Cooper* cases, indicate that an automobile, like a home, is indeed a usual and customary repository of the "papers, and effects" of "the people" as specified in the Fourth Amendment. In our highly mobile society, people frequently keep items of value or of importance to them in the trunks, glove compartments or elsewhere within their cars.

Once this is grasped, the question whether the car is an "instrumentality" of the crime becomes beside the point. It is clear that a house can be used as an instrumentality of a crime as well as a car; for example, even bookmaking and numbers games are not conducted entirely *al fresco;* they generally have an indoor headquarters where the basic accounting and other central operations relating to them are carried on. In a real sense, these premises are an instrumentality of those crimes, just as much as a vehicle used to supply the transportation element in a crime is. But it would be absurd to infer from this, as the Government apparently concedes, that this would justify the police in sweeping up and seizing, without a warrant, all the contents of the premises. Indeed, this was the very practice held to violate the Constitution in *Kremen* v. *United States,* 353 U.S. 346 (1956). Cf. *Taylor* v. *United States,* 286 U.S. 1 (1932).

Cases of physical and chemical analysis of an object are quite different. A bullet which is subjected to ballistic analysis, a powder which is subjected to a chemical analysis; or a shirt whose stains are analyzed, is not a respository for the "papers, and effects" of the people. Analyzing or examining these objects is not, in language or in law, a "search". On the other hand, an automobile, like a house, is an enclosed space into which people enter and in which

they keep their effects. This factual distinction is the basis for the application of the Fourth Amendment.

Before concluding, we must observe that the Government's conduct here was inconsistent with the "instrumentality/contents" theory. For the record indicates that after the officer who searched appellant's car found the registration card and delivered it to the police property clerk at the precinct station, the Government felt it necessary to obtain a search warrant specifying the card and directed to the property clerk. If the Government's afterthought theory of an "instrumentality/contents" seizure were valid, there would have been no need for this action. We suggest that the Government's belated practical disinclination to act in accordance with the "instrumentality/contents" theory was well founded.

B. *The "Fragmentation" Approach*—Despite the Government's concession that the search here in which the registration card was found was made pursuant to the Police Regulation's mandate of a general search of all automobiles in police custody, the lower courts (the Court of Appeals in order to avoid the broader questions presented by the case, R. 154) concluded that at the precise moment that the police officer found the registration card he was not making a search, but acting simply to protect petitioner's property. Under this approach to the case, the officer's conduct is fragmented into a series of moments, in some of which he was making a search and in others of which he was not.

Moments before the police officer found the registration card, he was engaged in searching the front seat of the car. If his search had been more thorough, he would have

found the registration card a few seconds before he did. Instead, he proceeded to close the car doors on the left-hand side and to go around to the right-hand side. The Court of Appeals held that when he opened the doors on the right-hand side, he was not engaged in making a search but was acting solely in trying to protect petitioner's car by rolling up the windows.

In any event, the lower courts' rationale for the legality of the seizure of the registration card cannot be sustained. The whole process of going through the petitioner's car proceeded from a number of motives. The Court of Appeals purported to act on the basis of the District Court's findings (R. 155-56); but the District Court well observed that:

> ". . . I feel compelled to find these as facts for purposes of this motion. He [the officer] went out to the automobile to do several things: to tag the car, to roll up the windows, to lock the doors, and to, if you want to call it, search, to go through the automobile to see whether or not there was any valuable property in it . . ."

and the District Court observed:

> "he says very plainly that he had all these things in mind; and before he finished with the vehicle on this particular day, I think it was his conclusion which the evidence compels that he intended to see that all these things were done; and they were all done, because eventually he even looked in the trunk." (R. 118)

As we have suggested above, the search for valuables to protect cannot be separated from the search for evidence.

to prosecute; and, as the District Court recognized, the police officer was throughout engaged in one continuous operation which had as its purposes not only the rolling up of the windows and the locking of the doors, but the searching of the car.

Indeed, the interrelationship of all these elements is plain. The Court of Appeals expressed the view that the police officer momentarily was engaged purely and simply in rolling up the windows of the car to protect it from the light rain that was falling when he happened upon the registration card. But the record also makes it plain that the reason why the windows had not been previously raised by the crane operator who brought the car in was that the operator did not wish to interfere with the use of the car for evidentiary purposes, that is, with fingerprints that might have been on the car (R. 61, 76). Indeed, the officer's testimony was clear that he happened upon the card as part of the search he was making:

> "Q. As I understand, Officer, after having tagged the car, you went rather carefully through the interior of the car, is that correct?
>
> A. Yes, sir.
>
> Q. Why didn't you go into the trunk at that time?
>
> A. I was in the process of making the search of the interior and I hadn't got to the trunk. My search was interrupted by this piece of evidence that was lying in the door jamb." (R. 80)

Obviously and concededly the Officer was engaged in the continuing process of what is called an "inventory search" —a search under the Police Regulation—when he opened the door and found the registration card. But, as we have

indicated, because one of the undeniable effects of an inventory search of an automobile in the case of a car "taken from a prisoner" is to obtain evidence against him, an inventory search is not permissible under these circumstances without a valid search warrant.

To attempt to fragment out a few seconds from the search, those seconds when the officer found the card, and to say that they were not part of the search is to engage in a stultifying exercise and to embark upon a rule which would be incredibly difficult of practical administration, resulting in constant psychological examination of police officers in a futile quest for their motives as of a given instant. The present record is illustrative. Here the police officer, immediately before he found the registration card, had been in the front seat of the car going through the contents of the glove compartment. He indicated that it was "possible" for him to have rolled up the right front window from where he sat going through the glove compartment. Instead, the officer walked around to the other side of the car and opened the door for the purpose of rolling up the window. It was then that he saw the item of evidence in question. While the specific location of the card—on the door jamb and underneath the door itself—might be an unusual one, common experience teaches that papers and other loose things frequently are found in cars between the right front door and the side of the front seat. Most drivers have had the experience of papers or small articles placed on the front seat while driving without a passenger in the front seat, slipping to the side while the car is in motion and lodging between the seat and the right front door. No careful search of an automobile would omit opening the front door and looking in this location, and the

officer's search here did not. Whatever the officer's stated purpose, the precise action he was taking at the time of finding the card was calculated to advance a search of the vehicle—as indeed it did. In the light of this, and the admitted fact that the officer was generally engaged in making a search of the vehicle at the time the discovery occurred, we submit that there is no basis for concluding that the finding of the registration card did not stem from a search of petitioner's motor vehicle; and for the reasons previously stated, we submit that that search could not have been constitutionally undertaken without a warrant.

* * * * *

As this Court observed as recently as the end of the last Term: "In assessing whether the public interest demands creation of a general exception to the Fourth Amendment's warrant requirement, the question is not whether the public interest justifies the type of search in question, but whether the authority to search should be evidenced by a warrant, which in turn depends in part upon whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search." *Camara* v. *Municipal Court*, 87 Sup. Ct. 1727, 1733 (1967). As we have demonstrated, there was absolutely no reason why a warrant could not have been obtained for the search involved here. The case does not come within the exceptions from the necessity to obtain a warrant discussed in the *Preston* and *Cooper* cases. Moreover, the assertion made by the Police Regulation, the basis of the search here, of a general exception to the Fourth Amendment's warrant requirement in the case of automobiles in police custody is completely unfounded and is refuted by the *Preston*, *Cooper*, *Camara* and *Berger* cases. There is no claim by the Government that the admission of

the fruits of the search and seizure into evidence here was, if error, harmless. Accordingly, the judgment of the Court of Appeals on rehearing, and petitioner's conviction by the District Court, should be reversed.

Conclusion

For the reasons stated, the judgment should be reversed.

Respectfully submitted,

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No. 92

In the Supreme Court of the United States

OCTOBER TERM, 1967

JAMES H. HARRIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

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Acting Solicitor General,
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